THE HIGH COURT OF SIKKIM : GANGTOK

CRIMINAL APPEAL NO. 1 OF 2003

In the matter of an appeal against conviction.

1. Ranjit Roy,
S/o Shri Bhola Roy,
R/o Netaji More,
New Jalpaiguri,
West Bengal.

2. Durga Burman (Roy)
S/o Devi Burman
R/o Netaji More,
New Jalpaiguri,
West Bengal
(both are in custody) .... **Appellants**

VERSUS

State of Sikkim .... **Respondent**

For the appellant : Shri N. Rai, Advocate.

For respondent : Shri N. B. Khatiwada, Public Prosecutor assisted by Shri J. B. Pradhan, Government Advocate and Shri Karma Thinlay, Assistant Government Advocate.

PRESENT: THE HON'BLE SHRI JUSTICE R. K. PATRA, CHIEF JUSTICE.
THE HON'BLE SHRI JUSTICE N. SURJAMANI SINGH, JUDGE.

Date of judgment : 15th December, 2003.

J U D G M E N T

R. K. PATRA, C.J.

This appeal filed on behalf of the two appellants is directed against the judgment dated 31st December, 2002 of the

learned Sessions Judge (E & N) Sikkim at Gangtok in Criminal Case No. 31 of 2001 convicting them under section 302/380/34 IPC. Both of them have been sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.2,000/- (Rupees two thousand) each under section 302/34 IPC. They have also been sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.1,000/- (Rupees one thousand) each for the offence under section 380/34 IPC. Both the sentences are to run concurrently.

2. The prosecution case is as follows:-

At the relevant time Monorama Devi (hereinafter referred to as the 'deceased') was residing near Metro Point, Gangtok in a rented house with her husband Lalan Prasad PW1 and two sons Ranjit PW2 and Raju PW3. In June, 2001 the deceased sub-let one room to Shibu PW4. The said room was being shared between Shibu PW4 and appellant no.2 Durga Roy. In the latter part of June, the appellant no.2 Durga Roy went to New Jalpaiguri and came back on 2nd July, 2001 with the appellant no.1 Ranjit Roy who started living in the same room with appellant no.2 Durga Roy as his guest. Both the appellants used to take food in Hotel Diamond, Lall Market, Gangtok. On 5th July, 2001 appellant no.1 Ranjit Roy received a telephonic message to the effect that his mother was seriously ill and he should return home immediately. He could not go home as he had no money. On the next day, i.e., 6th July, 2001 both the appellants in pursuance of their common intention entered the room of the deceased and caused her death by strangulating her

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neck using a strip of cloth as a weapon of offence. They also committed theft of a Sitco wrist watch belonging to Lalan Prasad PW1 and cash of Rs.2,300/- and fled away to New Jalpaiguri where both of them arrested.

3. The plea of the appellants was one of denial.

4. The prosecution examined 16 witnesses in support of its case. There is no eye-witness to the occurrence. The prosecution relied on only circumstantial evidence.

5. The learned Sessions Judge on the basis of the following circumstances held the appellants guilty under section 302/380/34 IPC :-

(i) Appellant no.2 Durga Roy brought appellant no.1 Ranjit Roy from New Jalpaiguri and put him up as his guest in the adjoining room of the deceased which was let out to him and both of them were staying in the same room.

(ii) In the morning of the incident, both of them were present in the room. The dead body of the deceased was found lying strangulated in her room with a piece of cloth tied around her neck. The said piece of cloth was brought by Shibu PW4 for tiding betel leaves and was kept in the same room where he (PW4) and appellant no.2 Durga Roy were staying.

(iii) The Sitco wrist watch (exhibit IX) and cash of Rs.2,300/- were found missing from the room of the deceased after the incident and the said wrist watch

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was recovered from the house of appellant no.2 Durga Roy at New Jalpaiguri at his instance.

6. PW14 is the doctor who conducted the autopsy on the dead body of the deceased. He found the following external injury:

> "(1) Deep grooved ligature mark 1.5 cm. wide at the lower boarder of the thyroid cartilage placed horizontally, completely encircling the neck covered by the two rounds of twisted ligature material."

According to the doctor, the cause of death was asphyxia as a result of ante-mortem strangulation by ligature. He further stated that the deceased died quite sometime after she had taken meals as the food particles were in an advanced process of digestion and were not identifiable. The time of her death could be around about two hours after she took her meals. On his re-examination, the doctor further clarified that it was a case of strangulation because -

(1) There was sub-conjunctival haemorrhage which is usually not found in cases of suicidal hanging.

(2) The face was suffused.

(3) The ligature mark was horizontal.

(4) There were emphysematous bullae on the pural surfaces of both lungs which are usually found in cases of strangulation only.

(5) There was laceration and contusion of the trachea mucosa which is usually found in cases of strangulation only.

He was categorical that the strangulation was ante-mortem. He also stated as the knot of the ligature material was placed behind the neck, the strangulation was carried out from behind.

From the above evidence, there can be no doubt that the deceased had homicidal death. Shri Rai, learned counsel for the appellants does not dispute this position.

7. In the course of hearing of this appeal, a petition was filed under section 391 read with section 482 Cr.P.C. on behalf of the prosecution praying for taking additional evidence. It was submitted that one Kakuli Biswas was not examined although the prosecution tendered her as a witness to be examined. In the disclosure statement exhibit P-6 made under section 27 of the Evidence Act, appellant no.2 Durga Roy although put his signature, the same was not identified. In view of his denial in his statement recorded under section 313 Cr.P.C., the said signature needs to be identified. On consideration of the said prayer, by order dated 19th August, 2003 this Court directed the learned Sessions Judge to permit the prosecution to re-examine Kakuli Biswas and the Investigating Officer. In obedience to the said direction, the learned Sessions Judge re-examined Kakuli Biswas and the Investigating Officer and transmitted their evidence to this Court.

8. The learned counsel for the appellants vehemently contended that so-called links forming the chain of circumstances have not been established satisfactorily and, therefore, the conviction of the appellants is vitiated. Shri Khatiwada, learned Public Prosecutor on the other hand contended that the circumstances on the basis of which conviction has been recorded are well-established.

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9. In view of such rival contention, let us now peruse and assess the evidence adduced on behalf of the prosecution.

Lalan Prasad PW1 is the husband of the deceased. He stated that on the date of incident (6th July, 2001) when he returned home around 2.30 p.m. his younger son Ranjit PW2 informed him that the deceased was lying on the ground with a rope around her neck. He immediately rushed to the house and found that his wife was lying dead on the ground in one of the rooms occupied by him. Thereafter, he lodged FIR exhibit P-1. In the cross-examination, it was brought out that his younger son Ranjit PW2 had already seen the dead body before he reached the house. He also stated in his cross-examination that Ranjit PW2 and Raju PW3 are the sons from the first husband of the deceased. Ranjit PW2 deposed that on the date of incident he came home at about 2.30-3.00 p.m. and found that the door of his mother's room was ajar. He called out his mother but there was no response. After opening the door, he entered the room and found that his mother was lying on the floor and her neck was tied with a piece of cloth. He thereafter went out to look for his elder brother Raju PW3 to whom he met on the way. He informed him that her mother had been killed. In the cross-examination, he stated that Lalan Prasad PW1 is his step-father. His specific evidence is that his mother had sub-let one room out of the three to Shibu PW4 who was working as a tailor. Raju PW3 is another son of the deceased. He identified both the appellants. He stated that his mother sub-let a room to Shibu PW4 with whom the appellants were residing. He stated that on

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the date of occurrence, before his departure from the house at 9 a.m., he found appellant no.2 Durga Roy had used his soap after going to the toilet. He asked him as to why he used that soap which was meant to be used for bathing. For this mistake, appellant no.2 Durga Roy apologized. At that time, appellant no.1 Ranjit Roy was also present who told him that he might take his soap for use. Thereafter, he (PW3) proceeded to his duty at Jainco Book Store. He returned home just after 3 p.m. and on the way he found his brother Ranjit PW2 who informed him about the murder of his mother. In the cross-examination, it was brought out that after he left for work at 9 a.m. his younger brother Ranjit PW2 also left for his work. He however could not say whether or not appellant no.2 Durga Roy stayed in the house or he also left. He stated that he found out from the tailoring shop where appellant no.2 Durga Roy was working that he had come to the shop in the morning and thereafter he had left. Shibu is PW4 who had taken one of the rooms on rent from the deceased along with appellant no.2 Durga Roy. He had kept one key of the room with him whereas appellant no.2 Durga Roy had kept another with him. On or about the first day of July, 2001 appellant no.2 Durga Roy came along with appellant no.1 Ranjit Roy saying that the latter was his guest. According to him (PW4) on the date of incident, he went to Sangram Pan Shop at about 2.30-45 p.m. where he met one Dhiraj, a co-tailor working in the Rainbow Tailoring Shop along with the appellant no.2 Durga Roy. The said Dhiraj enquired from him the whereabouts of appellant no.2 Durga Roy as the tailor master

the proved circumstances should be consistent only with the hypothesis of the guilt of the accused and rule out a reasonable likelihood of the innocence of the accused.

The Court cannot also forget the rule of caution indicated by Baron Alderson in his charge to the jury in R. V. Hodge, (1938) 2 Law CC 227, where it was said:-

> "The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual the more likely was it, considering such matter, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete".

11. On a close and careful analysis of the evidence on record, the following factual position emerges. On the date of occurrence (6th July, 2001) the husband of the deceased Lalan Prasad PW1, her two sons Ranjit PW2 and Raju PW3 left leaving behind the deceased and the appellants in the house around 9 a.m. Ranjit PW2 was the first person to reach home around 2.30 p.m. who found his mother's dead body strangulated with a piece of cloth exhibit IV around her neck. Therefore, the deceased must have been done to death after 9 a.m. and before 2.30 p.m. What could be the approximate time of the murder? It is in the evidence of Shibu PW4 that he along with one Dhiraj came to the house at about 2.30 p.m. to 2.45 p.m. to find out if appellant no.2 Durga Roy was present but he found him absent and his room was locked. This witness (Shibu PW4) must have come prior to the arrival of Ranjit PW2 because had Ranjit PW2

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had seen Shibu PW4 coming to their house he would have stated it in his evidence. Of course, the time given by the witnesses may not be taken in mathematical precision. The doctor (PW14) who conducted post-mortem examination of the deceased stated that time of her death could be around about two hours after she took her meals.

From the above circumstances at best, it can be held that the deceased might have been murdered soon after she took her meals. As mentioned above, the appellants and the deceased were last seen in the house around 9 a.m. but both the appellants were not found in the house thereafter and absconded till their arrest on 8th July, 2001 (vide arrest memo) at New Jalpaiguri. Besides this, appellant no.2 Durga Roy led the Investigating Officer PW16 to his house at New Jalpaiguri on 17th July, 2001 and gave recovery to the Sitco wrist watch exhibit IX which was found missing from the house of the deceased. The Investigating Officer PW16 stated that the appellant no.2 Durga Roy while in custody disclosed that he had hidden the wrist watch stolen by him from the house of the deceased in his residence at New Jalpaiguri. Accordingly, he (appellant no.2 Durga Roy) led the Investigating Officer PW16 on 17th July, 2001 to his house and the wrist watch was seized on being produced by his mother. In the disclosure statement exhibit P-6 he had put his signature. The said wrist watch belonged to the husband of the deceased whose name was etched on the underside of it both in English and Hindi. Appellant No.2 does not claim the said wrist watch to be his.

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12. At this stage, it is relevant to state that the appellants were charged under section 302/34 IPC and have been found guilty thereunder. To invoke the aid of section 34 IPC, it is necessary that the criminal act complained against was done in furtherance of the common intention of all the accused persons. The common intention implies a prior meeting of mind. It can also be formed suddenly at the spot. The prosecution has not laid any evidence on this score.

So far as appellant no.1 Ranjit Roy is concerned, there is no evidence against him except that in the morning on the date of occurrence he was present in the house of the deceased and remain absconded till he was arrested on 8th July, 2001 at New Jalpaiguri. An act of absconding is no doubt a relevant piece of evidence but the said act does not by itself lead to a conclusion that he is guilty. There is no other incriminating material against him to connect with the offence. The suspicion however strong be cannot take the place of proof. For reasons aforesaid, we are inclined to hold that the prosecution has not been able to prove its case against appellant no.1 Ranjit Roy beyond reasonable doubt. He is, therefore, entitled to be acquitted on the benefit of doubt.

13. In the present case, the charge against both the appellants is specific in the sense that in furtherance of their common intention they committed the murder of the deceased. With the acquittal of appellant no.1 Ranjit Roy the charge of sharing common intention fails. It does not however mean that appellant no.2 Durga Roy can also secure acquittal. There is no

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was looking for him. PW4 told Dhiraj that he might be in his room and accordingly took him there and found that he (appellant no.2 Durga Roy) was not there and the room was locked. He stated that exhibit IV (piece of cloth which was tied on the neck of the deceased) was brought by him with which he tied one bundle of betel leaves and kept it in the room where he was staying along with appellant no.2 Durga Roy. He further stated that he had seen appellant no.1 Ranjit Roy but he did not actually know him. This witness (PW4) was also arrested in connection with the case. That is the reason perhaps he stated in his cross-examination that appellant no.2 Durga Roy used to sleep in his tailoring shop and in the night preceding the date of occurrence he was not present in the room and he had not met him on the date of occurrence. PW5 deposed that his wife informed him that he saw both the appellants going on the road and they told her that they were going to their home. PWs 6 and 7 are witnesses to seizure of certain articles. PW8 is the owner of a hotel called 'Diamond' at Lall Bazar, Gangtok. He identified both the appellants and stated that they had made arrangements with him to eat food in his hotel on a weekly payment basis. PW9 is also a seizure witness. PW10 is a formal witness who deposed that he knew the deceased who was residing in the floor below his rented accommodation. He also deposed about seizure of certain articles. Brijkishore Prasad PW11 stated that on the request of Officer-in-charge, Sadar Police Station he accompanied him to New Jalpaiguri. Appellant no.2 Durga Roy also proceeded with them who led

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them to his house at New Jalapiguri. He stated that when they were standing outside his house, his mother brought the wrist watch (exhibit IX) and handed over the same to the Officer-in-charge. He (PW11) was also a witness to disclosure statement exhibit P6 said to have been made by appellant no.2 Durga Roy under section 27 of the Evidence Act. In his cross-examination, he admitted that he could not say whether the woman who came out of the house and handed over the wrist watch was the mother of appellant no.2 Durga Roy. He further stated that the said appellant did not disclose anything or gave any statement including exhibit P6 in his presence. PW12 is another such witness who accompanied the Officer-in-charge to New Jalpaiguri. He stated about the production of the wrist watch exhibit IX by the mother of appellant no.2 Durga Roy. He was a witness to disclosure statement exhibit P6 prepared by the Investigating Officer. He also stated that appellant no.2 Durga Roy did not make any statement in his presence. Kakuli Biswas PW13 was in course of trial was tendered by the prosecution but she was not examined. As already stated, on the prayer made by the prosecution before us for taking additional evidence, she came to be examined. She in her re-examination stated that she knew appellant no.2 Durga Roy. She stated that her husband works as a tailor in one of the tailoring shops at Lall Bazar, Gangtok where appellant no.2 Durga Roy was also working. She also identified appellant no.1 Ranjit Roy as he visited her residence along with appellant no.2 Durga Roy but she did not know his name. She further stated that about two

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and half years back when she was standing at the top of the building and looking down, she found both the appellants going. They told her that they were proceeding to their house at New Jalpaiguri. In the cross-examination, she stated that day was 4th of July. She asserted that she remembered that day because on that day she performed the puja in her residence to commemorate the annual death anniversary of her father-in-law. This being her evidence, it is of no use to the prosecution *inasmuch* the occurrence took place not on 4th July, 2001 but on 6th July, 2001. PW14 is the doctor who conducted the post-mortem examination on the dead body of the deceased. PW15 is the owner of Rainbow Tailoring Shop at Lall Bazar, Gangtok. He deposed that appellant no.2 Durga Roy was working as a tailor in his shop. He stated that in 2001 he had gone to his house at New Jalpaiguri on leave and returned after a week. After joining the duty for one day he did not report for duty from the next day onwards. PW16 is the Investigating Officer. This witness was re-examined on the direction of this Court who identified the signature of appellant no.2 Durga Roy in the disclosure statement exhibit P6.

10. Admittedly, there is no eye witness to the occurrence. The conviction of the appellants is based purely on circumstantial evidence. It is now well-settled that in a case founded on solely circumstantial evidence each and every incriminating circumstance should be clearly proved by reliable and clinching evidence and all the circumstances so established should form a chain of events without leaving any gap. Further,

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legal bar to convict him under the substantive provision if on the basis of evidence it could be held that he was the author of the crime.

Let us, therefore, examine his case separately. As already stated, he was found in the house of the deceased in the morning on the date of occurrence. In the said house, no other inmate was present except the deceased. He was a co-tenant along with Shibu PW4 in respect of one room belonging to the deceased. Shibu PW4 deposed that he had gone to the house of the deceased at 2.30 p.m. to 2.45 p.m. to find out if he was present in his room but he did not find him and his room was locked. He had not returned to his room since then and remained absconded till he was arrested on 8th July, 2001. He gave recovery to the Sitco wrist watch which was found missing on the date of occurrence. Having regard to the above circumstances, we have no hesitation to hold that he (appellant no.2 Durga Roy) after committing the murder of the deceased also committed the theft of the wrist watch exhibit IX. He is, therefore, clearly guilty of offences punishable under sections 302 and 380 IPC. The conviction recorded by the learned Sessions Judge under sections 302/380/34 IPC is hereby converted to one under sections 302 and 380 IPC.

14. In the result, the conviction and sentence of the appellant no.1 Ranjit Roy under sections 302/380/34 IPC are hereby set aside. He is acquitted of the charges. He may be set at liberty forthwith if his detention is not required in any other case. Appellant no.2 Durga Roy is hereby convicted under

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sections 302 and 380 IPC. The sentences imposed against him by the learned Sessions Judge on both the counts stand confirmed. The appeal is thus allowed in part.

(N. Surjamani Singh)
Judge
15.12.2003

(R. K. Patra)
Chief Justice
15.12.2003